SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941.

J. E. STEVENS AND McKAY STEVENS,
Petitioners,

vs.

SINCLAIR REFINING COMPANY, A CORPORATION,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinion of the Court Below.

The opinion of the United States Circuit Court of Appeals for the Eighth Circuit in *Sinclair Refining Company, A Corporation, Appellant, vs. J. E. Stevens and McKay Stevens, Appellees,* is reported in 123 F. (2d) 186.

II.

Statement of Jurisdiction.

The petitioners, in support of the jurisdiction of this Court to review the above cause on writ of certiorari, respectfully state:

A.

Statutory Provisions Sustaining Jurisdiction.

Jurisdiction of this Court is based upon the Judicial Code, Section 240, as amended by the Act of February 13,

1925, Chapter 229, Section 1, 43 Stat. 938 (U. S. Code, Title 28, Section 347), which provides in part as follows: (Section 347a)

> "In any case, civil or criminal, in a circuit court of appeals, or in the United States Court of Appeals for the District of Columbia, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted appeal."

Jurisdiction of this Court is also based upon subdivision (b) paragraph 5 of Rule 38 of the Revised Rules of the Supreme Court of the United States, which provides in part as follows:

> "5. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following . . . indicate the character of reasons which will be considered.
>
> (b) Where a circuit court of appeals has rendered a decision in conflict with the decision of another circuit court of appeals on the same matter; . . . or has so far departed from the accepted and usual course of judicial proceedings, . . . as to call for an exercise of this court's power of supervision."

B.

Date of Decree of Circuit Court of Appeals.

The judgment sought to be reviewed was handed down on November 5, 1941 (R. 87). Petition for Rehearing was

duly filed (R. 87). On November 26, 1941, the Petition for Rehearing was denied (R. 89). Thereafter, upon motion of the petitioners the Circuit Court of Appeals on December 9, 1941, entered its order staying the issue of the mandate for a period of thirty days (R. 90).

C.

Nature of Case and Ruling Below.

This is an action for damages growing out of respondent's negligent destruction by fire of petitioner's building and contents located therein. The petitioners alleged that the loss occurred as a result of the negligence of respondent while installing, repairing and altering certain equipment used in connection with the filling station which occupied a part of the building. Respondent defended the case on the theory that the respondent had procured from petitioners certain instruments purporting to indemnify and release the respondent from its own negligence. In their reply the petitioners admitted the execution of these instruments but denied that they ever had any application to the repairing of the property. Thereupon the respondent filed a Motion For Judgment on the Pleadings, which was overruled by the District Court.

A trial by jury resulted in a verdict and judgment in the District Court in favor of the petitioners in the amount of five thousand two hundred fifty dollars as compensation to the petitioners for the destruction of the building and its contents by fire. Thereafter in due course the present respondent, as appellant below, took the case to the United States Circuit Court of Appeals for the Eighth Circuit. It did not, however, take up to the Circuit Court of Appeals the transcript of the testimony, but, rather, confined its appeal to the issues presented by the pleadings.

The entire case on appeal turned on the point of

whether these release and indemnifying instruments which the petitioners had signed at respondent's suggestion, relieved the respondent of liability for its admitted acts of negligence committed in repairing the equipment which it had installed for use in the petitioners' filling station located in the building. The Circuit Court of Appeals reversed the judgment outright, holding that the District Court should have sustained respondent's Motion For Judgment on the Pleadings. However, in deciding the case the Circuit Court of Appeals completely sidestepped the question of whether these so-called releases and indemnifying provisions now being advanced by the Sinclair Oil Company for use over the entire country actually made any provision for releasing the oil company from liability for its admitted acts of negligence committed in repairing the equipment subsequent to its installation. The Court of Appeals neither ruled this point for nor against the present petitioner; it brushed this question aside by saying that the present petitioners had not properly pleaded acts of negligence committed in repairing the equipment.

In so ruling, the Circuit Court of Appeals refused to accept as true for the purposes of determining the Motion For Judgment on the Pleadings all facts and allegations set out in the amended petition; also it sought to say that the alleged defects in wiring alleged in the petition applied to the installing of the equipment and not to the repairing of it, notwithstanding the allegation in the amended petition to the contrary.

D.

Cases Believed To Sustain Jurisdiction.

The action of the Circuit Court of Appeals in this case is, so far as we have been able to determine, without prece-

dent, either in the federal courts or in our state courts in Missouri.

In passing upon the motion testing the *sufficiency of the pleadings to state a cause of action*, the Court of Appeals has, in fact, ruled upon the correctness of the allegation, thereby substituting its judgment, arrived at without the benefit of any of the testimony, for the verdict of the jury, who heard all the testimony.

Not only does this ruling of the Circuit Court of Appeals present a most unusual departure from the accepted and usual course of judicial proceedings of this character, but (1) the decision is squarely in conflict with the decisions of the other Circuit Courts of Appeal on the same matter; and (2) the decision completely negatives the effort of the parties and trial court by means of a pretrial conference under rule 16, Federal Rules of Civil Procedure, 28 USCA, following section 723c, to agree upon the construction of the pleadings so as to raise the issue of law to be decided.

Under such circumstances the following cases sustain the petitioners' assertion of jurisdiction in this Court:

Montgomery Ward & Co. vs. Duncan 311 U. S. 243, 61 S. Ct. 189.

Sibbach vs. Wilson & Co. 312 U. S. 665, 61 S. Ct. 422.

Magnum Import Co. vs. Coty 262 U. S. 159, 43 S. Ct. 531.

III.

Statement of The Case.

In the interest of brevity, petitioners do not here make a statement of the case, since the full statement has been given under heading "A" in the Petition For Writ of Certiorari.

IV.

Specifications of Errors.

(1) In passing upon the Motion For Judgment on the Pleadings the Circuit Court of Appeals erred in refusing to accept as true, for the purposes of the Motion, all material allegations set out in the amended petition.

(2) Since the amended petition pleaded conjunctively that the alleged acts of negligence were committed while the respondent was engaged in installing, *repairing* and altering the electrical equipment, the Circuit Court of Appeals, in passing upon the Motion For Judgment on the Pleadings, erred in arbitrarily holding on the pleadings and without the evidence before it that, notwithstanding the allegations in the amended petition to the contrary, no act of negligence charged in the amended petition was actually committed while the respondent was engaged in repairing the equipment.

(3) Since the memorandum of the District Judge clearly shows that both of the parties presented the case to the trial court upon the theory that the amended petition alleged that negligence was committed by the respondent in repairing the electrical wiring, and since the present respondent, as appellant below, failed to bring up the testimony (thereby precluding the Circuit Court of Appeals from ascertaining the theory on which the case was tried in the District Court), the Circuit Court of Appeals erred in refusing to accept the construction put upon the pleadings by the parties to the suit at the pretrial conference held before the District Court where the parties "collaborated" in framing the pleadings to present the issue of law to be ruled upon.

V.

Summary of Argument

(1) The Circuit Court of Appeals refused to accept as true, for the purpose of ruling upon the Motion For Judgment on the Pleadings, all material allegations set out in the amended petition. In so holding, the Eighth Circuit Court of Appeals is directly in conflict with the decisions of other circuit courts of appeal on the same matter.

Wells v. Helms et al. 10 Cir., 105 F. (2d) 402.

Art Metal Const. Co. for Use of McClosky & Co. v. Lehigh Structural Steel Co., 3 Cir., 116 F. (2d) 57.

Ryan v. City of Warrensburg, et al. 342 Mo. 761, 117 S. W. (2d) 303.

(2) Whether or not the Circuit Court of Appeals really intended to depart from this well recognized rule of pleading, certainly its opinion placed upon the pleadings a technical and different construction from that adopted by the parties and by the District Court as a result of the pretrial conference in this case at which the parties, as evidenced by the memorandum of the District Judge, collaborated in framing the pleadings to raise the issue of law involved; and in doing this, the Eighth Circuit Court of Appeals has, in effect—without so much as mentioning the rule in its opinion—completely misconstrued rule 16, Federal Rules of Civil Procedure, 28 U. S. C. A., following section 723c. The action of the Eighth Circuit Court of Appeals in this respect not only resulted in a great injury to these petitioners, but the opinion of the Court of Appeals also presents for this Court's correction a matter of great general importance in the construction of rule 16 in such a manner as to preclude any future possibility of parties unsuspectingly collaborating with the District Judge

on pleadings in a pretrial conference, only to be entrapped on appeal by the appellate court's enforcement of strict and technical rules of construction of the same pleadings in such a manner as to read out of the case the legal issue tried in the District Court.

Rule 16, Federal Rules of Civil Procedure, 28 U. S. C. A. following section 723c.

Montgomery Ward & Co. v. Duncan, 311 U. S. 243; 61 S. Ct. 189.

Sibbach v. Wilson & Co., 312 U. S. 665; 61 S. Ct. 422.

E. R. Sunderland, 45 W. Va. L. Q. 5.

VI.

ARGUMENT

I.

We are not unmindful of the fact that this Court's time is largely required in matters involving much larger sums than that represented by the judgment in this case. However, these petitioners are not in federal court because they chose to be, but because their case was removed from the state courts of Missouri where they filed it.

And having been required to prosecute their claim in federal court, the Circuit Court of Appeals has acted in a manner without precedent in depriving the petitioners of their rights. Under these circumstances, the petitioners must look to this Court for relief in a case involving a comparatively small sum, but by reason of their limited means, a case of great importance to your petitioners.

Inasmuch as the respondent (as appellant below) did not bring up the transcript of the testimony but confined its appeal to the assignment that the District Court erred in overruling respondent's Motion For Judgment on the Pleadings, attention naturally turns to the allegations

of negligence set up in the amended petition.

The Circuit Court of Appeals in the opinion in this case said:

> "In response to these contentions of the plaintiffs, the defendant presents . . . (2) that the amended petition does not plead that plaintiffs suffered damage as the proximate result of any negligence of defendant in making repairs" (R. 81).

The Circuit Court of Appeals might have added that this contention was advanced for the first time in the defendant's reply brief. In the light of this statement from the opinion, we call this Court's attention to the pleadings in the case.

In paragraph "5" of the amended petition the present petitioners alleged that "*After said equipment was installed and had been operating for several days*" the present respondent "opened a vapor proof box containing the wires and switches on one of the pumps" and made certain changes in the electrical wiring (R. 20).

Then in paragraph "8" of the amended petition the present petitioners alleged:

> "8. That wholly disregarding its duty to exercise due care in the installing, repairing and altering of said equipment, said defendant carelessly and negligently installed, repaired and altered said equipment as hereinabove pleaded, and that such negligence was, in part, as follows, to-wit:" (R. 21).

Immediately following this preliminary statement and as a part of the same sentence, the petitioners set up six (the Court of Appeals erroneously says five) specific acts of negligence, each referring back to the general statement appearing at the beginning of the paragraph which said that the negligence occurred while the "defendant carelessly and negligently installed, *repaired* and altered

said equipment". One of these specific acts of negligence pertained to the negligent wiring and obviously referred to the changing of the wiring "after said equipment was installed", as mentioned in paragraph "5". This specific act dealing with the negligent repairing of the wiring read:

> "C. the defendant failed properly to connect and insulate the exposed wires leading from plaintiffs' building to the motors located in defendant's pumps and failed to properly tape and insulate the exposed wires and failed to make a proper connection between said wires and the motors in defendant's pumps; and" (R. 22).

Finally, immediately following the listing of the six specific acts of negligence, and as a part of the same paragraph, the amended petition pleaded:

> "that *as the direct and proximate result* of the above enumerated acts of negligence the electrical equipment used in operating said pumps became overheated, thereby producing a fire on plaintiffs' premises on the 18th day of July, 1939," (R. 22).

The amended petition in this case was filed as a result of the pretrial conference held by the parties with the District Judge before whom the case was pending for trial. And as a result of that pretrial conference, the petition was so amended as to plead specifically that the negligence occurred not only while the equipment was being installed but that the negligence also occurred while the electrical wiring was being repaired. This was done so that a clean cut issue of law might be raised on the pleadings to determine whether, as a matter of law, the instruments set up in the answer constituted a defense to the defendant's negligence while engaged in repairing the equipment as well as installing it.

The District Judge filed a memorandum in which he

said:

> "The parties have collaborated in so framing the pleadings (pendings) that the issue of law involved is clearly presented."

And the District Judge further said: "Such action is to be commended." (R. p. 55).

The theory of this procedure was that by collaboration in the pretrial conference the parties might frame the pleadings in such a way as to get a ruling upon the question of law involved without going to the wholly wasteful expense of trying the case and then presenting the question on a demurrer to the evidence or an instructed verdict.

It, therefore, came as a complete surprise when the present respondent (as appellant below) waited until after your petitioners had filed their brief in the Circuit Court of Appeals, and then for the first time in its reply brief claimed that the petitioners had not properly drawn their pleadings in the amended petition so that the question of negligence in repair could be passed upon. The only chance that your petitioners had to counteract this unjust entrapment was the oral argument before the Circuit Court of Appeals. At that time your petitioners called to the attention of the Court of Appeals that the District Judge, as evidenced by the memorandum which he had filed (R. 55), thoroughly understood that the question of *negligence in repair* had been presented by the pleadings.

Notwithstanding all this, the Court of Appeals followed the suggestion of the respondent oil company and sidestepped a decision of the outstanding point of controversy in the case. It declined to pass upon the question of the legal sufficiency of the releases as far as *negligence in making repairs* was concerned, and simply stated:

> "These specific acts (of negligence) are set out above and no one of them is an act of negligence on

the part of the defendant in making repairs." (R. 83).

It will be noticed that the Court of Appeals did not say that the amended petition failed *to allege* that this was "an act of negligence on the part of the defendant in making repairs"; the Court of Appeals simply held outright that, despite the plain allegations in the petition to the contrary, no one of these acts of negligence" is an act of negligence on the part of the defendant in making repairs".

This amounted to a refusal by the Circuit Court of Appeals to accept as true, for the purposes of ruling upon the Motion For Judgment on the Pleadings, all material allegations set out in the amended petition. In so refusing to pass upon the legal issue testing the sufficiency of the releases, the Circuit Court of Appeals used the Motion For Judgment on the Pleadings as a means of determining the *merits* of the case rather than as a means of determining the *sufficiency of the amended petition to state a cause of action.*

Of course, in so holding the Eighth Circuit Court of Appeals is directly in conflict with the decision of the Tenth Circuit Court of Appeals on the same matter decided in the case of *Wells v. Helms et al.*, 10 Cir., 105 F. (2d), l. c. 463, where it is said:

> "A motion for judgment on the pleadings admits every material fact properly stated in the pleadings and admits the untruth of allegations in movant's pleadings which have been denied."

And this decision of the Eighth Circuit Court of Appeals is also in conflict with the holding of the Third Circuit Court of Appeals on the same matter decided in the case of *Art Metal Const. Co. for Use of McClosky & Co., Inc., v. LeHigh Structural Steel Co.*, 3 Cir., 116 F. (2d) 57, l. c. 58, where it said:

> "This is an appeal from a judgment entered upon

the pleadings on a motion by the defendant, Rule 12(c), Rules of Civil Procedure, 28 U. S. C. A. following section 723c. In considering such a motion the facts alleged by the plaintiff must be taken to be true and the inquiry is whether upon those facts plaintiff has stated a cause of action."

Of course, the rule as reiterated in the two decisions above quoted from the Tenth and Third Circuit Courts of Appeal represents the rule carefully adhered to in Missouri, *Ryan v. City of Warrensburg et al.*, 342 Mo. 761, l. c. 769, 117 S. W. (2d) 303, l. c. 306, and so far as we have been able to learn, in every other state. The confusion which has arisen in this case illustrates how completely untenable is the position of the Eighth Circuit Court of Appeals in this decision in substituting its opinion (that the negligence charged *is not* an act of negligence committed in repairing the equipment) for the plain allegation in the amended petition (that such negligence is negligence committed in making repairs).

Whether the Circuit Court of Appeals is willing to repudiate this well established rule openly or whether it arrives at the same conclusion by setting the pleadings out in its opinion and then taking issue with the correctness of the allegation in the amended petition, the result is the same as far as the ruling upon the Motion For Judgment on the Pleadings is concerned.

II.

It may possibly be argued in favor of this opinion by the Eighth Circuit Court of Appeals that the appellate court did not really intend to depart from this well recognized rule of pleading, but, rather, that it was persuaded to place upon the pleadings a more strict construction than that adopted by the parties and by the trial court as a re-

sult of the pretrial conference.

If this position should be taken as an excuse for the opinion of the Eighth Circuit Court of Appeals in the present case, then even a more serious problem is presented to the Supreme Court for its determination: namely, is the provision for a pretrial conference as authorized in rule 16, Federal Rules of Civil Procedure, 28 U. S. C. A., following section 723c, to be so construed as to give it any practical use in the framing of the pleadings to present particular issues for trial, or is it to be completely disregarded by the appellate courts who may, without warning to the litigants, resort to the old and technical rules of pleading to determine what issues they will rule on and what issues they will not?

It is quite likely that unless the Supreme Court is willing in this case to construe this rule governing pretrial conferences so as to give protection to the litigant who relies upon this procedure in collaborating with the opposite party and the trial court to fix the issues, others, too, may find themselves unsuspecting victims of a carefully planned defense which leads (1) from the pretrial conference to the trial upon simplified pleadings admittedly understood by all, and then (2) to an appeal by the defendant of the judgment but without benefit of the transcript of the testimony, and finally (3) to a claim for the first time by the defendant-appellant in its reply brief that after all the pleadings are not sufficiently definite to state the issue which both parties and the trial court from first to last fully understood and acted upon.

Rule 16 provides that: "The court shall make an order which recites the action taken at the conference . . . and which limits the issues for trial to those not disposed of by admissions or agreements of counsel . . ." This

the district Judge undertook to do when he said: "This cause is pending upon motion for judgment on the pleadings. The parties have collaborated in so framing the pleadings (pendings) that the issue of law is clearly presented. Such action is to be commended." The District Judge then stated: "The negligence charged in the petition is . . ." etc.; and he explained: "It is predicated upon the legal theory that . . ." etc. (R. 55).

All this the Circuit Court of Appeals had before it when it subscribed to the claims first urged in the respondent's reply brief, and said: "no one of them (alleged acts of negligence) is an act of negligence on the part of the defendant in making repairs." (R. 83). This unprecedented action of the Court of Appeals was squarely in the teeth of rule 16, which specifically provides:

> ". . . . and such order (by the District Court) when entered controls the subsequent course of action, unless modified at the trial to prevent manifest injustice."

Obviously, there was no showing that the order of the trial court was "modified at the trial to prevent manifest injustice", for the simple reason that the respondent (as appellant below) did not bring up the record of the trial for consideration by the Court of Appeals.

Under this state of the record, the Eighth Circuit Court of Appeals had no right to brush these petitioners aside on the one issue most urgently pressed by the petitioners. It was the duty of the Circuit Court of Appeals to decide whether the so-called releases actually release the present respondent of liability for its own negligence committed in making repairs.

Even if we completely disregard the pretrial conference, the Circuit Court of Appeals erred in failing to give

to the pleadings a liberal construction affecting the understanding of the parties and the District Court as to what the pleading said.

"The real test of good pleading under the new rules is not . . . whether the allegations would be deemed good at common law. The test is whether information is given sufficient to enable the party to plead and to prepare for trial. A legal conclusion may serve the purpose of pleading as well as anything else if it gives the proper information. If the party wants more, he may ask for more details in regard to the particular matter that is stated too generally." *E. R. Sunderland,* 45 W. Va. L. Q. 5.

The Circuit Court of Appeals wrongfully deprived your petitioners of their judgment, and in doing so violated rule 16 governing pretrial procedure. The Missouri decision by the St. Louis Court of Appeals (Munsey v. Eagle Packet Co., 50 S. W. (2d) 754-756, 757) cited by the Circuit Court of Appeals is no authority in holding the allegation in the amended petition inadequate, for Missouri has no provision for pretrial procedure for the formulating of issues.

That this Court will review the record in a case involving the construction of the new Federal Rules of Civil Procedure, is well established. *Montgomery Ward & Co. v. Duncan,* 311 U. S. 243, 61 S. Ct. 189; *Sibbach v. Wilson & Co.* 312 U. S. 665; 61 S. Ct. 422.

Conclusion

While the Eighth Circuit Court of Appeals in this case has been willing to disregard the federal rule governing procedure and to rely upon the Missouri cases for

authority to justify its requirement in this instance for technical and strict pleading, yet the Circuit Court of Appeals has showed no similar inclination to be influenced by our Missouri authorities which have declared the substantive law here involved.

In so far as the so-called releases prepared by the respondent oil company may be construed to preclude petitioners' recovery, the Circuit Court of Appeals has said in its opinion: "The provisions should not be read out of the contract. In the long run, they doubtless affect costs and profits . . ." (R. 86).

In construing similar contracts calculated to relieve one of liability for one's own future acts of negligence, our Missouri court of last resort has not been particularly impressed with the argument of "costs and profits". In the recent case of *Missouri District Telegraph Co. v. Southwestern Bell Telephone Co. et al.*, 338 Mo. 692, l .c. 712, 93 S. W. (2d) 19, l. c. 28, the Supreme Court of Missouri said:

> "It is well settled that a contract of indemnity will not be construed to indemnify the indemnitee against losses resulting to him through his own negligent acts, where such intention is not expressed in unequivocal terms . . . Indeed, it would take clear language to show that a contract of indemnity was intended to cover conditions or operations under the control of the party indemnified, and not under the control of the indemnifying party, such, for instance, as accidents, the proximate cause of which is the negligence of the party indemnified."

Considering the repugnant character of the provisions

by which the respondent oil company undertook to relieve itself of responsibility for its own acts of negligence *to be committed in the future*, your petitioners believed that even in a federal court they had a right to rely upon the Missouri rule of strict construction applicable to such instruments. Instead, the Eighth Circuit Court of Appeals has upheld these releases, saying "they doubtless affect costs and profits". And, of course, upon the one allegation to which there is no defense for this respondent and to which these instruments are completely inapplicable—negligence *in repairing* electrictl equipment— the Circuit Court of Appeals has sidestepped the issue on a nice distinction of pleading.

May we say once more that we realize this Court during the past few years has been occupied with cases of great national importance. But it must not be said that this Court is too occupied to hear the case of the common man who finds himself thrust before a busy forum. These petitioners have no other court to which they can turn. They have done nothing wrong; it is they who have been wronged—admittedly so under the state of this record. The substantive law argues in their favor. The so-called releases or indemnifying agreements do not purport to give the respondent Sinclair Oil Company a free hand to commit future torts indiscriminately in repairing electrical equipment used in the buildings of other people. Nor is the oil company's offenses in this respect made any the less vicious by arguing, as the Circuit Court of Appeals did, that to curtail them would "doubtless affect costs and profits." By the same argument it might be said that these petitioners, who have had taken from them all they have, should be entitled to have these repugnant agreements strictly construed as required by public policy

in Missouri as declared by our State Supreme Court, for to do otherwise has affected petitioners' "costs and profits".

It does little to relieve petitioners' sense of injustice to say, in effect, that we have reverted to a practice which the parties, and quite evidently the District Court, thought had been discarded in the interest of substantial justice, and then have a circuit court of appeals advance strict and unreasonable rules of construing pleadings as a means of not requiring this oil company to pay for the damage admitted by the Motion For Judgment on the Pleadings to have been done by its own negligence.

Although rule 16 was evidently intended to implement the use of the liberalized rules of civil procedure, yet we have found no case by the Supreme Court of the United States construing that portion of the rule purporting to give to litigants who participate in a pretrial conference the assurance that the pretrial conference "controls the subsequent course of the action."

It is inconceivable that there have not already been presented to this court other worthy cases in which the litigants found themselves trying to operate under the new rules of liberalized procedure while being penalized under the old rules of strict construction of pleadings; but, nevertheless, this Court has apparently not taken jurisdiction in any of these cases. May we respectfully urge the careful consideration by the Court of the instant case, to the end that justice may be done where justice is badly needed, and to the further end that the inferior courts of the United States will recognize and realize that the Supreme Court is not too busy to supervise the construction

of the new rules when a flagrant case of misconstruction is presented to it.

Respectfully submitted,

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